THELEN
Thelen Reid Brown Raysman & Steiner LLP

701 Eighth Street, NW Washington, DC 20001
Phone: 202 508 4000 Fax: 202 508 4321
www.thelen.com

James A. Stenger
202.508.4308 Direct Dial
202.654.1805 Direct Fax
jstenger@thelen.com

March 3, 2008

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Re: Reply Comments of Genesys SA
In the Matter of Request for Review of InterCall, Inc.
Of Decision of Universal Service Administrator
CC Docket No. 96-45

Dear Ms. Dortch:

Transmitted herewith on behalf of Genesys SA are the original and four copies of the Reply Comments of Genesys SA in the matter of the Request for Review of InterCall, Inc. of Decision of Universal Service Administrator in CC Docket No. 96-45.

Should additional information be necessary in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,

James A. Stenger

Encl.

DC #391608 v1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Request for Review of InterCall, Inc.	)	
of Decision of Universal Service	)	CC Docket No. 96-45
Administrator	)	
	)	

REPLY COMMENTS OF GENESYS SA

Scott Brian Clark
James A. Stenger
Thelen Reid Brown Raysman & Steiner, LLP
701 Eighth Street, N.W.
Washington, D.C. 20001
(914) 843-3053
(202) 508-4308

March 3, 2008

SUMMARY

The Commission should grant the InterCall stay request. *Qwest v. FCC* holds that the Commission has "very broad discretion" to chose between rulemaking and adjudication. If the Commission intends to do anything other than reverse the Decision, the Commission should proceed by rulemaking. Since rulemaking is prospective only, the Decision must be stayed pending the rulemaking.

Even if the Commission decides to proceed by adjudication, the Decision should be stayed. *Qwest v. FCC* recognizes that a decision that changes existing law should only be applied prospectively. The Decision changes existing law. Therefore, if not reversed, it should be stayed and applied only prospectively.

Existing law is clear. In the *Computer Inquires* the Commission drew a distinction between information and telecommunications service in order to promote competition, innovation and investment in information services. USF fees are only to be collected on telecommunications not information services as the Commission recognized in the *Stevens Report* and the *Universal Service Order*. The Commission's recent holding in *Qwest v. Farmers* applies the same distinction to access charges.

No basis is shown to change existing law. Verizon has not shown that Verizon suffers any competitive disadvantage as Verizon has admitted that Verizon only pays USF fees on the telecommunications component of its teleconference service. AT&T's decision to use one of two safe harbors and pay USF fees on both the telecommunications and audio bridging components is a unilateral decision of AT&T that is not required under existing law. Classification of CSPs as telecommunications providers would be contrary to the public interest and to longstanding Commission case law that promotes a competitive information service market.

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Administrator	)	
	)	

REPLY COMMENTS OF GENESYS SA

Genesys SA ("Genesys"), by its undersigned counsel and pursuant to the Public Notice, DA 08-371 (Feb. 14, 2008) , hereby submits these reply comments in support of the Request for Review (the "Appeal") and stay request (the "Stay Request") of InterCall, Inc. ("InterCall") of a decision of the Universal Service Administrator (the "Administrator") of January 15, 2008 (the "Decision"), and in support hereof respectfully shows as follows.

I. Summary of the Comments.

The appeal and stay request are supported by the teleconference service industry in comments filed by Premiere Global Services, Inc. ("Premiere"), Canopco, Inc. ("Canopco"), Telespan Publishing Corporation ("Telespan") and Genesys ("Conference Service Providers" or "CSPs"). The CSPs confirm InterCall's position that the CSPs purchase toll-free 8xx service from inter-exchange carriers ("IXCs") as end-users. CSPs do not certify to the inter-exchange carriers ("IXCs") that the CSPs are carriers or resellers. CSPs do not seek or obtain an exemption from being charged USF fees by the IXCs on the toll-free 8xx services the CSPs purchase from the IXCs. The CSPs also support InterCall's position that teleconference service is properly classified as an information service, not a telecommunications service. The CSPs

urge the Commission to apply any ruling herein prospectively on the grounds that they have followed existing law and any change in the law should be prospective.

Three IXCs filed comments, Verizon, AT&T, Inc. ("AT&T") and Qwest Communications International, Inc. ("Qwest"). Qwest takes no position on the Appeal but supports the Stay Request and the prospective application of a decision on the Appeal.[1] AT&T states that, "[b]ased on AT&T's understanding of Commission orders, rules, and the Instructions to ...Form 499-A...AT&T treats audio teleconferencing service as a telecommunications service and thus contributes to the [USF] based on *both* the underlying transport and its 'audio bridging service' revenue."[2] AT&T further asserts that USF fees are payable on video conferencing and that, "it seemed unlikely that the Commission would include video conferencing services but exclude audio teleconferencing services from assessment."[3] AT&T states that AT&T is willing to accept a retroactive ruling that InterCall must pay USF fees, "on its audio bridging service revenues for prior years *and* any incremental increase in revenue associated with the transport that it purchased from AT&T and other wholesale providers."[4] AT&T states that, "the Commission should make any finding with respect to transport contributions *prospective only*."[5]

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[1] Qwest Comments at 2 ("Qwest supports InterCall's position that the Commission should address this issue such that any decision is made only on a prospective basis and applies across the industry." As such Qwest's position here differs from Qwest's position in *Qwest v. FCC*, 509 F.3d 531 (D.C. Cir. 2007)("*Qwest v. FCC*"), where Qwest sought retroactive application of a Commission ruling on access charges. Here Qwest acknowledges that Qwest has collected from CSPs and paid to USAC the USF fees on the toll-free 8xx service, unlike the situation in *Qwest v. FCC* where access charges had not been paid.

[2] AT&T Comments at 2 (emphasis in original, citation omitted).

[3] AT&T Comments at 3.

[4] AT&T Comments at 6 (emphasis in original).

[5] AT&T Comments at 5 (emphasis in original).

AT&T also contends that "web- and IP-based teleconferencing services ...are enhanced services," and, "those services are *not* at issue in the instant appeal."[6]

Verizon opposes the InterCall appeal and stay request. Verizon asserts that audio bridging is a telecommunications service, not an information service.[7] Although Verizon acknowledges that CSPs provide some information services, Verizon characterizes the information services offered by CSPs as "incidental features."[8] Verizon opposes the InterCall stay request, argues that the rules were clear and should be applied retroactively, and urges the Commission to allow USAC immediately to collect from InterCall and other competitors to Verizon what Verizon alleges to be a substantial retroactive liability for unpaid USF fees.[9]

II. The Commission Should Stay The Decision While The Commission Reviews This Matter.

USAC ordered InterCall to register as a telecommunications service provider and pay retroactive USF fees within 60 days of the January 15, 2008 Decision. Absent a stay, USAC also is likely to issue deficiency notices to other CSPs and require them to register as telecommunications service providers and make retroactive USF fee payments. Therefore, it is imperative that the Commission grant the Stay Request prior to March 17, 2008.

The Commission should stay the Decision either on the grounds that the Commission tentatively concludes that this matter should be handled through a rulemaking or on the grounds that the Decision changes existing law. The Commission has very broad discretion to chose to handle this matter by rulemaking. In the event the Commission chooses to proceed by rulemaking, no question exists that the results of the rulemaking may only be applied prospectively and the Decision must be stayed.

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[6] AT&T Comments at 2, Note 2 (emphasis in original).
[7] Verizon Comments at 2.
[8] Verizon Comments at 4;
[9] Verizon Comments at 7 and note 16.

Even if the Commission decides to proceed by adjudication of the Decision, a stay should be granted. An adjudication must be applied prospectively where the adjudication changes existing law. Existing Commission law is clear that information service providers do not become telecommunications service providers through the purchase and use of telecommunications to deliver their information services. As a result, no question exists that the Decision changes existing law and should be stayed.

A. The Commission Should Stay The Decision Based Upon A Tentative Conclusion To Proceed By Rulemaking.

Notwithstanding the D.C. Circuit's recent decision in *Qwest v. FCC*, the Commission retains broad discretion to stay the Decision. In *Qwest v. FCC* the D.C. Circuit reversed a decision by the Commission to apply a declaratory ruling prospectively. The D.C. Circuit held that a declaratory ruling is an adjudication and the Commission's discretion is limited in deciding whether to apply an adjudication prospectively.[10] However, the court also acknowledged and affirmed that the Commission enjoys "very broad discretion" as to whether to address an issue by rulemaking or by adjudication.[11] The court further acknowledged that where the Commission chooses to proceed by rulemaking, the rules adopted may only be applied prospectively.[12] Accordingly, under *Qwest v. FCC* the Commission retains "very broad discretion" to chose to handle this matter by rulemaking and stay the Decision given that any rule changes can only be applied prospectively.[13]

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[10] *Qwest v. FCC*, 509 F.3d at 536 and 539.
[11] *Qwest v. FCC*, 509 F.3d at 536 ("[A]gencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking.'")
[12] *Qwest v. FCC*, 509 F.3d at 539 ("[I]n a rulemaking context...the retroactivity issue is now moot because of *Bowen v. Georgetown University Hospital.*)
[13] A stay on this basis would be invulnerable to attack because the Commission has very broad discretion to decide to handle this matter by a rulemaking.

The Commission recognizes that the InterCall appeal raises industry-wide issues as the Commission requested public comment on the Appeal and Stay Request.[14] All of the comments indicate that the resolution of the issues presented by the appeal will have a significant impact upon the industry. None of the comments, including those of Verizon and AT&T, have cited any prior rulemaking where the Commission has addressed the issue presented. The Decision relies upon a one-sentence change in the Form 499-A instructions made in 2002 without discussion or consideration in a rulemaking. Accordingly, it would be appropriate to initiate a rulemaking to consider the issues presented.[15]

A decision by the Commission to stay the Decision based on a tentative conclusion to proceed by rulemaking would be unlikely to be successfully challenged by Verizon, AT&T or any other interested party. A reviewing court would be unlikely to overturn the Commission's "very broad discretion" to select rulemaking as the more appropriate format to address the issues presented.[16] A stay must necessarily follow from a tentative conclusion to proceed by rulemaking because a rulemaking may only apply prospectively.[17]

B. Even If The Commission Chooses Adjudication, The Decision Should Be Stayed Because The Decision Changes Existing Law.

The D.C. Circuit in *Qwest v. FCC* held that adjudicatory decisions normally are applied retroactively. However, the court noted two important exceptions. The court held that an adjudication should not be applied retroactively where the decision changes existing law. The court found that exception inapplicable in *Qwest v. FCC* because the court found that the

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[14] Public Notice, DA 08-371 (Feb. 14, 2008).
[15] While the request for comment on the InterCall appeal has provided an opportunity for public comment, the timeframe for analysis and submission of comments has been truncated by the InterCall filing deadline set in the Decision. The Decision should be stayed so that a rulemaking can be conducted that allows an appropriate and customary timeframe for analysis and comment.
[16] *Qwest v. FCC*, 509 F.3d at 536.
[17] *Qwest v. FCC*, 509 F.3d at 539.

Commission had not shown that its decision changed existing law.[18] Here, the Decision changes existing law and therefore cannot be applied retroactively and must be stayed.

An overwhelming body of authority stands for the proposition that information service providers use telecommunications to deliver their information services, but do not become telecommunications carriers by the use of telecommunications to deliver their services. This is the core holding of the *Computer Inquires*.[19] The Commission applied this core principal to USF fees in the *Stevens Report*.[20] The Commission recently applied this core principal to access charges in *Qwest v. Farmers*.[21]

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[18] Because the court found that the Commission merely clarified and did not change existing law, the court found that the Commission needed to demonstrate that retroactive application of the decision would be manifestly unjust. Even if the Commission concludes that the Decision merely clarifies existing law, the Commission should stay the Decision because manifest injustice would result from making CSPs retroactively pay USF fees. Unlike the AT&T calling card situation, CSPs have not been treated as telecommunications service providers by the Commission or by state public service commissions. Their reliance upon their status as information service providers is based on years of case law and practice. Because they cannot retroactively bill their customers for back fees, it would be manifestly unjust to make them pay back USF fees.

[19] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, (*First Computer Inquiry*), 7 FCC 2d 11 (1966); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971)("*Computer I*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, *Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC 2d 358 (1979) (*Computer II Tentative Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), Docket No. 20828, *Final Decision*, 77 FCC 2d 384 (1980) (*Computer II Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Third Computer Inquiry*), CC Docket No. 85-229, *Report and Order*, 104 FCC 2d 958 (1986) (*Computer III*) (subsequent cites omitted) (collectively the "*Computer Inquiries*"). Information services were then referred to as enhanced services.

[20] *Universal Service*, *Report to Congress*, 13 FCC Rcd 11501(1998) ("*Stevens Report*"), at para. 26.

[21] *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone*, 22 FCC Rcd 17913 (2007), *recon.*, FCC 08-29 (Jan. 29, 2008)("*Qwest v. Farmers*").

Thus, Commission case law establishes that audio bridging is an information service and that information service providers purchase and use telecommunications service but are not telecommunications service providers. The Decision therefore changes existing law because it requires CSPs to register as telecommunications service providers, contrary to their existing status as information service providers under Commission case law. A decision that would change existing law may only be applied prospectively, as the D.C. Circuit acknowledged in *Qwest v. FCC*.[22] As a result, InterCall clearly is entitled to a stay and to prospective-only application of the Decision, in the event that the Commission does not reverse the Decision on appeal.

C. Verizon And AT&T Fail To Show That The Decision Follows Or Merely Clarifies Existing Law.

Adjudication cannot be applied retroactively where it substitutes new law for old.[23] As a result, Verizon and AT&T recognize that in order to attempt to justify retroactive application of the Decision, they must show that the Decision follows or merely clarifies existing law. Verizon and AT&T have failed to make this showing and, on the contrary, Verizon and AT&T effectively admit that CSPs are not required to pay USF fees under existing law.

If existing law classifies CSPs as telecommunications service providers, Verizon and AT&T would have obtained reseller certificates from the CSPs. Verizon and AT&T have alleged strong financial and competitive incentives for them to obtain reseller certificates from

[22] *Qwest v. FCC*, 509 F.3d at 540.
[23] *E.g., SEC v. Chenery*, 332 U.S. 194, 202, 67 S. Ct. 1575 (1947)("*SEC v. Chenery*").

CSPs if existing law allows them to do so.[24] Verizon fails to allege that it has obtained reseller certificates from CSPs. AT&T admits that AT&T has not.[25] If existing law had allowed them to do so, Verizon and AT&T would have obtained reseller certificates from PSPs given their strong financial and competitive reasons to do so. The only conclusion that can be drawn is that neither Verizon nor AT&T felt they had a reasonable basis to demand reseller certificates from CSPs, contrary to their characterization of existing law.

Verizon's claim that existing law requires CSPs to pay USF fees on all of their retail revenue is further contradicted by Verizon's admission that, "Verizon pays into the fund on the telecommunications components of its audio conferencing revenues."[26] Verizon's failure to allege that Verizon pays USF fees on all of its retail teleconference service revenue contradicts Verizon's assertion that existing law classifies audio bridging as telecommunications.

AT&T's allegation that AT&T pays USF fees, "on *both* the underlying transport and the 'audio bridging service' revenue" fails to support AT&T's assertion that AT&T's actions are based on existing law applicable to CSPs.[27] Carriers that bundle telecommunications and non-telecommunications services must pay USF fees either on the retail value of the telecommunications component or the bundled service offering under the USF safe harbor rules.

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[24] Verizon claims that Verizon has been placed at a competitive disadvantage by a failure of CSPs to pay USF fees directly. Verizon Comments at 5 and note 10. If so, Verizon had a strong financial incentive to present CSPs with reseller certificates. AT&T claims AT&T would face difficulties in obtaining refunds from USAC of USF fees collected from CSPs. AT&T Comments at 4. If so, AT&T also had a strong financial incentive to present CSPs with resale certificates.

[25] AT&T offers to aver that AT&T did not obtain reseller certificates from CSPs. AT&T Comments at 5, note 13.

[26] Verizon Comments at 6. Verizon later repeats, "Verizon already pay[s] into the fund on the telecommunications components of their retail audio conferencing revenues." Verizon Comments at 11.

[27] AT&T Comments at 2 (Emphasis in original; citation omitted.)

AT&T's choice of a particular safe harbor fails to demonstrate that existing law requires CSPs to pay USF fees.

Existing law, including the Instructions to Form 499-A, Section II.A., "Who Must File," distinguishes between information and telecommunications services and only requires that USF fees be paid on telecommunications, not information services. Verizon and AT&T have failed to show that the Decision amounts to anything other than a change in established law and practice with respect to CSPs, including the longstanding practice of Verizon and AT&T themselves in treating CSPs as end-users, not resellers. Because the Decision changes existing law, it must be stayed and, if not overturned, applied prospectively.[28]

III. The Comments Demonstrate That Teleconference Service Is Properly Classified As An Information Service.

The CSP comments demonstrate that teleconference service offered by CSPs is properly classified as an information service. Qwest does not dispute this. Verizon and AT&T have failed to show that CSPs currently are or should in the future be required to pay USF fees. Neither of their comments address the public policy issues that should guide the Commission in making a decision on this issue going forward.

A. Teleconference Service Offered By CSPs Is Not Subject To USF Fees.

The Commission drew a distinction between telecommunications and information services in the *Computer Inquiries* in order to promote competition in the provision of information services. The Commission concluded that it was necessary to create a separate regulatory classification for information services in order to prevent incumbent telecommunications carriers from using their control of the telecommunications transmission

[28] *SEC v. Chenery*, 332 U.S. at 202.

components to discriminate in favor of their information service offerings.[29] The 1996 amendments to the Act codified the distinction between telecommunications and information services drawn by the Commission in the *Computer Inquiries*.[30] Therefore, the Act directs the Commission to continue to apply these regulatory classifications in the manner that will best promote competition, innovation and investment in information services.

Congress limited the collection of USF fees to telecommunications service providers as the Commission recognized in the *Stevens Report* as well as the Commission rules and the Instructions to Form 499-A. The Act, the rules, and Form 499-A and Instructions all recognize that USF fees are only to be collected on telecommunications services.[31] Nothing in the *Universal Service Order* suggests that the Commission intended to abandon the distinction between telecommunications and information services in order to maximize the USF fee contribution base.[32]

AT&T's contention is incorrect that the *Universal Service Order* classifies video conferencing as a telecommunications service.[33] The Commission stated that video services offered on a common carrier basis would be subject to payment of USF fees.[34] CSPs are not subject to common carrier regulation either by the Commission or at the state level. Therefore,

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[29] It was feared that AT&T would gain an unfair advantage over IBM unless the Commission made clear that IBM could purchase the telecommunications components of information service offerings on the same terms and conditions as AT&T provided those components to itself. CSPs would lose this protection if they are not classified as information service providers.

[30] Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §153(43)(44) and (46); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 54 U.S. 967, 977, 125 S.Ct. 2688 (2005)("*Brand X*").

[31] *See* Genesys Comments at pages 7 and 12.

[32] *Federal-State Joint Board On Universal Service*, 12 FCC Rcd 8776 (May 8, 1997)("*Universal Service Order.*")

[33] AT&T Comments

[34] *Universal Service Order* at para. 781. ("Thus, for example, entities providing, on a common carrier basis, video conferencing services, channel service or video distribution services to cable head-ends would contribute to universal service.")

properly read, the *Universal Service Order* held that video conferencing services offered by CSPs, who are not common carriers, is not telecommunications and is not subject to USF fees.

B. No Reason Is Shown To Change Existing Law.

No harm has been shown and no reason has been shown to change existing law. The CSPs state that the CSPs purchase toll-free 8xx service as end users and do not seek an exemption from the payment of USF fees to the IXC's by certifying to the IXC's that toll-free 8xx service is being purchased for resale. Likewise, the IXCs all confirm that the IXCs treat the CSPs as end-users and charge USF fees on the toll-free 8xx service that the IXCs sell to the CSPs.[35] Thus, all parties agree that the CSPs pay USF fees to the IXCs on the toll-free 8xx service that is purchased by the CSPs from the IXCs and the IXCs in turn remit the USF fees to USAC.

Verizon has failed to substantiate its claim of competitive harm. On the contrary, Verizon has alleged only that Verizon pays USF fees on the telecommunications component of its conferencing services.[36] Likewise, CSPs pay USF fees on the telecommunications component of their service. Therefore, Verizon has failed to allege sufficient facts to support Verizon's claim of competitive harm.

AT&T also fails to show any competitive harm to AT&T notwithstanding AT&T's unilateral decision to pay USF fees on both transport and bridging. AT&T is free to avail itself of the alternative safe harbor and pay USF fees only on the transport component. Any alleged competitive harm suffered by AT&T is due to its own unilateral actions and is avoidable.

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[35] AT&T explains that AT&T collects USF fees from CSPs because AT&T must pay USF fees on revenues earned by AT&T unless AT&T obtains a reseller certificate which AT&T has not obtained from InterCall. AT&T Comments at 3-4. AT&T offers to provide the Commission with an affidavit and, on a confidential basis, copies of invoices demonstrating that AT&T "has imposed universal service fees on InterCall."

[36] Verizon Comments at 6 and 11. ("Verizon pays into the fund on the telecommunications component of its audio conferencing revenues.")

While AT&T acknowledges that AT&T imposes USF fees on the telecommunications services that AT&T sells to CSPs, nevertheless AT&T asserts that CSPs also should pay USF fees on, "any incremental increase in revenue associated with the transport that [a CSP] purchased from AT&T and other wholesale providers."[37] This assertion is incorrect. USF fees are payable on the retail value of the telecommunications component, as AT&T admits. The retail value of the telecommunications component is the price that CSPs pay to AT&T and other IXCs. As the Commission recently held in *Qwest v. Farmers*, CSPs are the end-users of the telecommunications component. CSPs therefore are paying the appropriate amount of USF fees to the appropriate party.

Subsidizing universal service is only one of the responsibilities delegated to the Commission. The Act continues to stand for the proposition that the responsibility of the Commission is to promote competition. Promoting competition is the touchstone of the telecommunications and information service analysis.[38] After all, competition lowers prices and improves service and thereby minimizes the need for subsidies. Classifying teleconference service offered by CSPs as a telecommunications service would be contrary to the Act as it would impair and impede an otherwise vibrant and efficient market for teleconference services. Accordingly, no public interest basis exists to change existing law.

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[37] AT&T Comments at 6. However, AT&T would except from USF fees "web- and IP-based teleconferencing services."

[38] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 54 U.S. 967, 977 and 101, 125 S.Ct. 2688 (2005)(" *Brand X*").

IV. Conclusion

The Commission should find either that teleconference service is properly classified as an information service based on the record herein, or that a further rulemaking proceeding is necessary to resolve this issue prospectively and, in the latter case, the Commission should stay the Decision pending the rulemaking.

Respectfully submitted,

Genesys SA

By: _____

Scott Brian Clark
James A. Stenger
Thelen Reid Brown Raysman & Steiner, LLP
701 Eighth Street, N.W.
Washington, D.C. 20001
(914) 843-3053
(202) 508-4308

Its Counsel

March 3, 2008

CERTIFICATE OF SERVICE

I, Roberta Muscarella, hereby certify that the foregoing Reply Comments of Genesys SA was served this 3rd day of March to the following:

Brad E. Mutschelknaus
Steven A. Augustino
Denise N. Smith
Kelley Drye & Warren LLP
3050 K Street, N.W.
Suite 400
Washington, DC 20007
Counsel to InterCall, Inc.

Cathy Carpino
Gary Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W.
Suite 1000
Washington, DC 20036
Counsel to AT&T Inc.

Karen Zacharia
Christopher M. Miller
Verizon
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
Attorneys for Verizon

Craig J. Brown
Tiffany W. Smink
Qwest Communications International ,Inc.
607 14th Street, N.W.
Suite 950
Washington, DC 20005
Counsel to Qwest

Charles V. Gerkin, Jr.
Charles A. Hudak
Friend, Hudak & Harris, LLP
Three Ravinia Drive
Suite 1450
Atlanta , GA 30346-2117
Counsel to Premiere Global Services, Inc.

William E. Snow
Catherine N. Smith
Chiampou Travis Besaw & Kershner LLP
45 Bryant Wood North
Amherst, NY 14228
Tax Representatives of Canopco, Inc. (U.S.)

Elliott M. Gold, President
Telespan Publishing Corporation
50 West Palm Street
Altadena, CA 91001-4337

FCC Copy Contractor*
Best Copy and Printing, Inc.
445 12th Street, S.W.
Room CY-B402
Washington, DC 20554

Greg Guice*
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street, S.W.
Room 5-4.340
Washington, DC 20554

David Duarte*
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street, S.W.
Room 5B-441
Washington, DC 20554

Roberta Muscarella

* By Hand